No. 14902

United States
Court of Appeals
For the Ninth Circuit

G. A. MILLER, W. W. LORD, RALPH SMEED, L. H. STAUS and JACK SMEED, Trustees of John W. Smeed Estate,

APPELLANTS,

vs.

SAM WAHYOU, DIAMOND-S RANCH CO., SAM WAHYOU, K. R. NUTTING and THOMAS G. LEE, as Trustees for the assets of Diamond-S Ranch Co., THOMAS G. LEE, TOY QUONG, JOE SIN, K. R. NUTTING, YIP K. TOON and HERBERT JANG,

APPELLEES.

APPELLANTS' BRIEF

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA

PIKE & McLAUGHLIN
Reno, Nevada
CARVER, McCLENAHAN & GREENFIELD
Boise, Idaho
SMITH & EWING
Caldwell, Idaho
Attorneys for Appellants

JOHN S. HALLEY
Reno, Nevada
Attorney for A. E. Corbari and Marie Corbari

JOHN DAVIDSON
Reno, Nevada
FORREST E. MACOMBER
Stockton, California
Attorneys for Diamond-S Ranch Co.

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Attorneys for Appellants

JOHN S. HALLEY
Reno, Nevada
Attorney for A. E. Corbari and Marie Corbari

JOHN DAVIDSON
Reno, Nevada
FORREST E. MACOMBER
Stockton, California
Attorneys for Diamond-S Ranch Co.

SUBJECT INDEX

		Page
I.	Statement of Jurisdiction	1
II.	Statement of the Case	4
III.	Specification of Errors	8
IV.	Argument	9
V.	Conclusion	31

TABLE OF AUTHORITIES CITED

CASES

Anderson vs. Anderson, 54 Nev. 108, 7 Pac. (2d) 814 25
Bacon vs. Robertson (1855) 18 How. 480, 15 L. Ed. 499 16
Buffum vs. Peter Barceloux Co. 77 L. Ed. 1140, 289 U. S. 227 32
Beeler & Campbell Supply Co. vs. Warren, 151 Kan. 755, 100 Pac. (2d) 700 ..... 21, 22
Bernard vs. Shure, 245 Pac. (2d) 370, 111 CA (2) 920 24
Broder vs. Conklin, 53 Pac. 699, 121 Cal. 282 26
Butler vs. Beach (1909), 82 Conn. 417, 74 Atl. 748 21
Dean vs. Shingle (1926) 198 Cal. 652, 246 Pac. 1049 28
Denman vs. Richardson, 284 Fed. 592 14
Farmers Loan Co. vs. San Diego Co. (CCSD Cal. 1891) 45 F. 518, 527, and 528 27
First National Bank of Selma vs. Colby, 21 Wall (U.S.), 609 22 L. Ed. 687 18
First National Bank vs. State of Maine, 284 U. S. 312, 76 L. Ed. 313, 52 S. Ct. 174, 77 A.L.R. 1401 13
G. M. Standifer Const. Co. vs. Com. of I. R. (CCA 9) 78 Fed. (2d) 285 18
Gottwals vs. Rencher, 60 Nev. 35, 92 Pac. (2d) 1000, 98 Pac. (2d) 481.. 25
Graves vs. Mono Lake Hydraulic Mining Co. (1889) 81 Cal. 303, 22 Pac. 665, 670 28
Highland Park Inv. Co. vs. List (1915), 27 Cal. App. 761, 151 Pac. 162 28
Hollingsworth vs. Multa Trina Ditch Co. (CCA10, 1931) 51 Fed. (2d) 649 ..... 14, 22
In re Booth's Drug Store, Inc. 19 F. Supp. 95 14
In re Horse Heaven Irr. District, 11 Wash (2d) 218, 118 P. (2d) 972 13
In re Int'l. Sugar Feed Co., 23 F. Supp. 197 19
In re Midwest Athletic Club (CCA 7, Ill.) 161 Fed. (2d) 1005 13
In re Parker's Estate, 251 Pac. 907, 200 Cal. 132, 49 A.L.R. 1025..... 26
In re 211 East Delaware Place Bldg. Corp., 7 F. Supp. 892 14
James vs. Unknown Trustees (Okla.) 220 Pac. (2d) 831 20
Lauger vs. Fargo Mercantile Co. (1921), 48 N.D. 545, 186 N.W. 104 26
Martin vs. Dixon, 49 Nev. 161, 241 Pac. 213 25
Merges vs. Altenbrand (1912), 45 Mont. 355, 123 Pac. 21 21
McDonald vs. Hewlett, 228 Pac. (2d) 83, 102 CA (2d) 680 26
National Surety Co. of N. Y. vs. Cobb, 66 F. (2d) 323 14

Page

North Confidence Mining Co. vs. Fitch, 58 Cal. App. 329, 208 Pac. 328 ..... 27, 34
Oklahoma Natural Gas Co. vs. Oklahoma, 273 U. S. 257, 71 L. Ed. 634, 47 S. Ct. 391 18
Palo Alto Assn. vs. First National Bank, 33 Cal. App. 214, 164 Pac. 1123 28
Pewabic Mining Co. vs. Mason, 145 U. S. 349, 36 L. Ed. 732, 12 S. Ct. 887 13
Remillard Brick Co. vs. Remillard Dandini Co. 241 Pac. (2d) 66, 109 CA (2) 405 24
Rossi vs. Caire, 186 Cal. 544, 199 Pac. 1042 ..... 14, 16, 20, 21
San Diego vs. Pacific Beach Co., 112 Cal. 53, 44 Pac. 333, 33 L. R. A. 788 34
Schnittger vs. Old Home Consol. Mining Co., 144 Cal. 603, 78 Pac. 9 35
Service & Wright Lumber Co. vs. Sumpter Valley Ry. Co. (1915) 81 Ore. 32, 149 Pac. 531, 152 Pac. 262, 158 Pac. 175 13
Sims vs. Petaluma Gas & Light Co. (1901), 131 Cal. 656, 63 Pac. 1011 28
Smith vs. Pac. Vinegar & Pickle Works, 145 Cal. 352, 78 Pac. 550, 104 Am. St. Rep. 42 35
Stearns Coal & Lumber Co. vs. Van Winkle (1915) 137 CCA 314, 221 F. 590, 241 U. S. 670, 60 L. Ed. 1230, 36 S. Ct. Rep. 554 13
Stuart vs. Chaney, 71 Colo. 279, 206 Pac. 386, 232 Pac. 638, 78 Colo. 421 16
Trower vs. Stonebraker-Zea Live Stock Co. 17 Fed. Supp. 687 14
Union P. R. Co. vs. Durant, 95 U. S. 576, 24 L. Ed. 391 27
U. S. vs. Bates Valve Bag Corp., 39 Fed (2d) 162 19
Walden vs. Bodley, 14 Pet. (U.S.) 156, 10 L. Ed. 398 27
Wells Fargo Bank & Union Tr. Co. vs. Blair (1928) 58 App. D. C. 160, 26 Fed. (2d) 532 15
Willison vs. Watkins (1830), 3 Pet. (U.S.) 43, 7 L. Ed. 596 ..... 16, 27

STATUTES AND REGULATIONS

Title 28, U.S.C.A., Section 1291 4
Title 28, U. S. C. A., Sections 1332 and 1655 4
Federal Rules of Civil Procedure, Rules 56 and 73 10
Nevada Compiled Laws:
Section 1664 10
Section 1665 11
Section 1667 11
Section 1669 15
Section 1692 17
California Civil Code
Sections 2224, 2228 28
Sections 2229, 2231, 2232 29
Section 2230 ..... 25, 29
Sections 2233, 2234, 2237 30
Section 2235 ..... 24, 30

TEXTS

Page

11 Am. Jur. pages 1208-9, Constitutional Law 22

13 Am. Jur. 1191, Corporations, Sec. 1342 18
1198, Corporations, Sec. 1352 12
1202, Corporations, Sec. 1359 16
1207, Corporations, Sec. 1366 19
1206, Corporations, Sec. 1366 20

54 Am. Jur., 364, Trusts, Sec. 453 34

54 Am. Jur., 364, Trusts, Sec. 458 27

1 A.L.R. 747 34

47 A.L.R. 1356, 1357, 1358 16

47 A.L.R. 1359, 1360 12

47 A.L.R. 1376 21

47 A.L.R. 1465 26

47 A.L.R. 1548 20

77 A.L.R. 1515 27

97 A.L.R. 479, 480 12

97 A.L.R. 486 16

97 A.L.R. 496 19

128 A.L.R. 918 27

132 A.L.R. 265 34

16 C.J.S. Constitutional Law, Sec. 422, page 875 22

19 C.J.S. page 1511, note 12 16

65 C.J., Trusts, Sec. 521, page 656 27

16 Fletcher Cyclopedia Corporations, Penn. Ed. Sec.
8130, page 861 23
Sec. 8131 (page 872) 23
Sec. 8170 (page 937) 19

3 Moore's Federal Practice, 3171, Summary Judgment, Chapter 56..... 10

Morowitz on Private Corporations (2d. ed.), Section 168 23

Willis, Trustees, 125, 172, 173 16

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I
STATEMENT OF JURISDICTION

Appellants, G. A. Miller, W. W. Lord, Ralph Smeed, L. H. Staus, and Jack Smeed, Trustees of John W. Smeed Estate, commenced this action as plaintiffs against A. E. Corbari and Marie Corbari, husband and wife, Sam Wahyou, Diamond-S Ranch Co., a Nevada corporation, and K. R. Nutting, Thomas G. Lee, Sam Wahyou, and A. E. Corbari, as trustees for said corporation, asking for a money judgment against the defendants A. E. and Marie Corbari,

praying that the assets of the defendant Diamond-S Ranch Co. be impressed with an equitable lien in favor of plaintiffs to secure the moneys alleged to be owed plaintiffs by the defendants A. E. and Marie Corbari, and, alternatively, for a money judgment against the defendant Sam Wahyou for the full amount of any money found due and owing plaintiffs from the defendants A. E. and Marie Corbari, including interest, attorneys' fees and costs. Thereafter, on October 21, 1954, plaintiffs filed an amended complaint (25) against Archie E. Corbari, Marie Corbari, Sam Wahyou, Diamond S. Ranch Co., a corporation, Forrest E. Macomber, A. E. Corbari, Sam Wahyou, K. R. Nutting, and Thomas G. Lee, as trustees for the assets of the Diamond S. Ranch Co, Thomas G. Lee, Toy Quong, Joe Sin, K. R. Nutting, Yip K. Toon, Herbert Jang, otherwise known as Herbert Jong, and D. W. Zignego. The relief demanded (34, 35) consisted of a money judgment against the defendants Corbari, that a receiver be appointed to take over the assets of the Diamond S. Ranch Co, that plaintiffs be decreed a proportionate interest in the assets of the Diamond S. Ranch Co., for an accounting, that the defendants be enjoined from disposing of any of the assets of the Diamond S. Ranch Co., for an order directing that the property and assets of the Diamond S. Ranch Co. be sold and plaintiffs paid from the proceeds of the sale, and that plaintiffs have judgment against the defendants Wahyou, Macomber, Nutting, Lee, Quong, Sin, Toon and Jang (or Jong), and each of them, for payment of the obligation due and owing plaintiffs.

All defendants thereafter answered to the Amended Complaint, (41, 51, 57) but the action against the defendants D. W. Zignego and Forrest E. Macomber was dismissed by virtue of the pre-trial order of the District Judge dated January 18, 1955 (130).*

Both plaintiffs and defendants ** filed motions for Summary Judgment. The District Court, on August 11, 1955 (153), entered judgment in favor of plaintiffs as to the First Count of their amended complaint, against plaintiffs and in favor of defendants as to the Second, Third and Fourth Counts of the amended complaint, in favor of plaintiffs and against the defendants A. E. and Marie Corbari for costs, and in favor of all defendants except A. E. and Marie Corbari, and against plaintiffs, for the costs of those defendants. From this judgment plaintiffs appealed to this Court, and Notice of Appeal was filed on September 9, 1955 (154).

Plaintiffs are citizens of the State of Idaho. The defendants A. E. and Marie Corbari are citizens of the State of Nevada. The defendant Sam Wahyou, individually and as trustee, is a citizen of the State of California. The Diamond S. Ranch Co. was incorporated under the laws of the State of Nevada with its principal place of business at Galconda, Nevada, and if it exists at all is a citizen of the State of Nevada. The defendants Nutting and Lee, individually and as trustees, are citizens of the State

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* Arabic Numerals in parenthesis refer to pages of the Transcript of Record.

** The parties will be referred to as plaintiffs and defendants in this brief.

of California. The defendant Macomber is a citizen of the State of California. The defendants Quong, Sin, Toon, Jang (or Jong), and Zignego are citizens of the State of California.

The amount here in controversy, exclusive of interest and costs, exceeds the sum of Three Thousand Dollars ($3000.00).

The District Court's jurisdiction in the action was based on Title 28, U.S.C.A., Sections 1332 and 1655. This Court has jurisdiction to determine this appeal under Title 28, U.S.C.A., Section 1291, and Rule 73, Federal Rules of Civil Procedure.

II

STATEMENT OF THE CASE

The facts in this case show that on or about December 31, 1948, the defendants A. E. Corbari and Marie Corbari made, executed and delivered to plaintiffs' decedent their promissory note in the amount of $15,041.34 (Tr. page 8), which amount with interest, except a payment of $750.00 remains due, owing and unpaid (146).

Thereafter, on or about the 22nd day of February, 1950, A. E. Corbari agreed with the plaintiffs that he would assign to plaintiffs as security for the payment of said note all of his interest in the Diamond S. Ranch Company, in which he owned 310 of 1572½ shares outstanding (69). Following this agreement to assign, specifically on the 7th day of September, 1950, the directors of the Diamond S. Ranch Company, with the aid of Forrest Macomber, their at-

torney, effected a voluntary dissolution of the Diamond S Ranch Company under the laws of the State of Nevada (72, and Pre-trial Exhibit No. 8). Thereafter, on October 31, 1950, A. E. Corbari and Marie Corbari executed formal assignment (84 and 85) of all their right, title and interest in and to the assets of the Diamond S. Ranch Company, then dissolved, to plaintiffs.

Following the voluntary dissolution of the Diamond S. Ranch Company on September 7, 1950, the directors of the company, trustees under the statutes of Nevada, did not wind up the affairs of the corporation and distribute the assets as required to do by the laws of Nevada. Instead, they operated the corporation exactly as theretofore and continued to do so until the charter was attempted to be revived in December, 1951 (72), without recognizing any interest in Corbari or in these plaintiffs.

Other pertinent facts are that on January 4, 1949, Corbari delivered to the Bank of America his 310 shares of stock in the Diamond S. Ranch Company, a Nevada corporation, endorsed in blank (Pre-trial Exhibit No. 1), as security for the payment of an obligation to the Bank, and at the same time executed a general pledge agreement to the Bank (106, 107, 108). On September 18, 1950, this pledge agreement was replaced with a new pledge executed by Corbari to the Bank of America (108 and Pre-trial Exhibit 2), to secure the obligation owing to the Bank of America covered by the first pledge, and to further secure obligations owing to one Zignego and attorney

Macomber. This second pledge was executed subsequent to the agreement to assign to Smeed of February 22, 1950, and subsequent to the dissolution of the corporation. Thereafter, on October 17, 1950, the Bank of America sold to the defendant Sam Wahyou Corbari's note (48, 70, and 126) and the September 18, 1950, pledge (106), in consideration of the payment by Wahyou of the balance due on Corbari's note to the Bank in the amount of $5000.00, plus interest. On February 9, 1951, Forrest Macomber, acting as attorney for Corbari and at the same time being the legally retained counsel for the Diamond S. Ranch Co. and for Sam Wahyou personally, wrote plaintiffs, offering to settle the obligation due them and secured by the assignment, for the sum of $5000.00 (page 99), which offer was rejected. On March 27, 1951, plaintiffs' assignment of October 31, 1950, was recorded among the land records of Humboldt County, Nevada, the county in which the real property assets of Diamond S Ranch Co. are located (12).

On May 14, 1951 (Pre-trial Exhibit No. 4), the defendant Sam Wahyou signed a notice of sale of the stock of the Diamond S. Ranch Co. previously held by Corbari, to take place on May 21, 1951, and in that notice recited that the sale was for the purpose of foreclosing a July 10, 1950, pledge of Corbari to the Bank of America which Wahyou had acquired. It should be here noted that the pledge referred to in the notice of sale can only be the second pledge agreement dated September 18, 1950 (Pre-trial Exhibit No. 2), and it should be further noted in that agree-

ment that the date of July 10, 1950, is the date of the note being secured by the pledge, whereas the date of September 18, 1950, is the actual date of the pledge.

On May 21, 1951, the sale of the stock was made to one Gordon J. Aulik, an associate of Forrest Macomber, acting for and on behalf of Sam Wahyou (107). The sale was conducted by Forrest Macomber, the attorney for Sam Wahyou, Corbari, and the Diamond S. Ranch Co. Plaintiffs received no notice of this sale.

Following all of the transactions hereinbefore set forth, on October 10, 1951, the stockholders of the Diamond S Ranch Company executed Appointment of Agent to revive the corporation, appointing Wahyou, Nutting and Lee as such agents (Pre-trial Exhibit 9). This instrument recited that defendants Wahyou, Nutting, Lee, Jang, Quong, Sin and Toon were holders of all of the stock and that Wahyou owned 631 shares. It should be noted that at dissolution Wahyou owned 321 shares, the difference being the Corbari stock.

On October 10, 1951, said agents executed under oath a Certificate of Revival or Renewal (Pre-trial Exhibit 9), in which it was stated that the corporation had been carrying on its business since the date of its dissolution. On December 7, 1951, the certificate was filed with the Secretary of State of the State of Nevada (Pre-trial Exhibit 9), and on April 4, 1952, the Secretary of State issued his certificate of renewal (Pre-trial Exhibit 9).

III
SPECIFICATION OF ERRORS

1. The lower court erred in finding as a matter of fact that there was no endorsement or delivery of the Corbari stock certificates to Lord, following the execution of the Corbari assignment, in that at the time of the execution of the assignment the Diamond S Ranch Co., was in dissolution and the certificates of stock of the dissolved corporation were no longer evidence of ownership in said dissolved corporation.

2. The lower court erred in finding as a matter of fact that on December 7, 1951, the date on which the Diamond S. Ranch Co. filed a Certificate of Corporate Revival, the defendant Wahyou then owned the Corbari stock, in that Wahyou could not have acquired ownership of the Corbari stock by purchase at a foreclosure sale during the period of corporate dissolution.

3. The lower court erred in not finding as a fact that throughout the period of corporate dissolution the defendant Wahyou was a trustee of the assets of the corporation, and that his purported purchase of the Corbari stock during dissolution and his subsequent assertion of ownership and control of said stock constituted a conversion to himself of the assets of said corporation which he was bound to hold in trust for the stockholders and their assignees.

4. The lower court erred in finding as a fact that the defendant Wahyou lawfully acquired the Corbari stock, and that all legal requirements were observed in the dissolution and revival of the corporation.

5. The lower court erred in finding that the plaintiffs were on notice and should have questioned the status of the Corbari stock, in that at the time the assignment was executed the corporation was in dissolution and the title to all of the property was in the trustees for the benefit of the former stockholders, assignees and creditors.

6. The lower court erred in finding that Wahyou had no knowledge of the assignment at the time he purchased the stock certificates at foreclosure, in that the Smeed assignment was a matter of record in Humboldt County, Nevada, the situs of the ranch property, and Wahyou, as trustee of the dissolved corporation, had constructive notice, at least, of the assignment.

7. The lower court erred in not finding as a fact that Wahyou and Corbari conspired, by and through their joint attorney, Macomber, to defraud plaintiffs.

8. The lower court erred in granting the Motion for Summary Judgment of defendants as to the Second, Third and Fourth Counts of the amended complaint.

9. The lower court erred in failing to grant plaintiffs' Motion for Summary Judgment as to the Second, Third and Fourth Counts of the amended complaint.

IV
ARGUMENT

1. A summary judgment should be rendered if the pleadings, depositions, admissions and proceedings

heretofore had in the action show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Rule 56, Federal Rules of Civil Procedure

3 Moore's Federal Practice, 3171, et seq, Summary Judgment, Chapter 56

2. The attempted revival of this corporation was invalid and without legal effect as to these plaintiffs, and as far as they are concerned, the Diamond-S Ranch Co. is now and ever since dissolution has been without corporate existence.

(A) When this corporation voluntarily dissolved, its assets became the property of its stockholders as tenants in common and it had no right to continue business as a corporation except to wind up its affairs. The statute expressly forbid it to do so.

The pertinent parts of the Nevada statute supporting this proposition are as follows: (Emphasis supplied)

> "Sec. 1664. Expired, Dissolved, Corporations Remain Bodies Corporate Three Years for Certain Purposes.
>
> "Sec. 65. All corporations, whether they expire by their own limitation, or are otherwise dissolved, shall nevertheless for the term of three years from such expiration or dissolution be continued as bodies corporate for the purpose of prosecuting and defending suits by or against them, and of enabling them gradually to settle and close their business, to dispose of and convey their property, and to divide their capital stock,

but not for the purpose of continuing business for which said corporation shall have been established."

"Sec. 1665. Directors, as Trustees, to Settle Affairs of Dissolved or Expired Corporations; Dissenting Stockholders' Rights.

"Sec. 66. Upon the dissolution of any corporation under the provisions of section 64 of this act, or upon the expiration of the period of its corporate existence, limited by its certificate or articles of incorporation, the directors shall be trustees thereof, with full power to settle the affairs, collect the outstanding debts, sell, and convey the property, real and personal, and divide the moneys and other property among the stockholders, after paying or adequately providing for the payment of its liabilities and obligations; * * *."

* * *

"Sec. 1667. Powers of Court in Event of Dissolution or Expiration of Corporate Existence.

"Sec. 68. When any corporation organized under this chapter shall be dissolved or cease to exist in any manner whatever, the district court, on application of any creditor or stockholder of such corporation, at any time, may either continue such directors, trustees as aforesaid, or appoint one or more persons to be receivers of and for such corporation, to take charge of the estate and effects thereof, and to collect the

debts and property due and belonging to the company, with power to prosecute and defend, in the name of the corporation, or otherwise, all such suits as may be necessary or proper for the purposes aforesaid, and to appoint an agent or agents under them, and to do all other acts which might be done by such corporation, if in being, that may be necessary for the final settlement of the unfinished business of the corporation; and the powers of said trustees or receivers may be continued as long as the district court shall think necessary for the purposes aforesaid."

13 Am. Jur., Corporations, Sec. 1352, page 1198, note 9.
47 A.L.R. 1359, 1360, Note 17
97 A.L.R. 479 and 480.

"A dissolution of a private corporation entirely changes the character of the property interest of its stockholders. It destroys their stock as such and under the modern equitable view substitutes the thing which their stock represented—that is, an interest in the corporate property. Indeed, there is ample authority for the doctrine that the stockholders of a corporation, when its existence ceases, become vested with a legal title to its property as tenants in common."

13 Am. Jur., Corporations,
Sec. 1352, page 1198

Supplemental authorities:

Re Midwest Athletic Club (CCA 7, Ill.)
161 Fed. (2) 1005

Re Horse Heaven Irr. District
11 Wash. (2d) 218
118 P. (2d) 972

First National Bank vs. State of Maine
284 U.S. 312
76 L. Ed. 313
52 S. Ct. 174
77 A.L.R. 1401 (recognizing rule)

Pewabic Mining Co. vs. Mason
145 U. S. 349
36 L. Ed. 732
12 S. Ct. 887

Stearns Coal & Lumber Co. vs. Van Winkle (1915)
137 CCA 314
221 F. 590

On Den. 241 U.S. 670
60 L. Ed. 1230
36 S. Ct. Rep. 554

Service & Wright Lumber Co. vs. Sumpter Valley Ry. Co. (1915)
81 Ore. 32
149 Pac. 531

152 P. 262 (on re-hearing)
158 P. 175 (on re-hearing)

(B) The vested rights of the stockholders would be impaired if the Legislature undertook to recreate a corporation after legal dissolution without the consent of a former stockholder who diligently asserted his rights. This is prohibited by both State and Federal constitutions.

Rossi vs. Caire
186 Cal. 544
199 Pac. 1042

National Surety Co. of N. Y. vs. Cobb
66 F. (2d) 323

Hollingsworth v. Multa Trina Ditch Co.
51 F. (2d) 649

In re Booth's Drug Store, Inc.
19 F. Supp. 95

Trower vs. Stonebraker-Zea Live Stock Co.
17 F. Supp. 687

In re 211 East Delaware Place Bldg. Corp.
7 F. Supp. 892

Denman vs. Richardson
284 Fed. 592

(C) When this corporation continued doing business as usual and in defiance of the express provisions of the statute, those who did so acted as partners. Its directors became trustees for the former stockholders and dealt with the assets as fiduciaries of Corbari, his assignees, and the other stockholders.

Quoting from Nevada Statutes:

"Sec. 1669. Trustees or Receivers to Distribute Funds of Corporation, when.

"Sec. 70. The said trustees or receivers, after payment of all allowances, expenses and costs, and the satisfaction of all special and general liens upon the funds of the corporation to the extent of their lawful priority, shall pay the other debts due from the corporation, if the funds in their hands shall be sufficient therefor, and if not, they shall distribute the same ratably among all the creditors who shall prove their debts in the manner that shall be directed by an order or decree of the court for that purpose; and if there shall be any balance remaining after the payment of such debts and necessary expenses (or the making of adequate provision therefor), *they shall distribute and pay the same to and among those who shall be justly entitled thereto, as having been stockholders of the corporation or their legal representatives.*"

Trustees have no legal title to assets of the dissolved corporation, such title vested in stockholders. Trustees have possession with power of sale and when debts are paid stockholders have right to possession.

Wells Fargo Bank & Union Tr. Co. vs.
Blair (1928)
58 App. D. C. 160
26 Fed. (2d) 532

Rossi vs. Caire
186 Cal. 544
199 Pac. 1042

The general effect of statutes designating or providing for the appointment of trustees for dissolved corporations is to constitute the property and rights of the dissolved corporation a trust fund to be administered by the trustees for the purposes specified by the legislature.

13 Am. Jur., Sec. 1359, page 1202
Anno. 47 A.L.R. 1356, 1357, 1358
Supplemental in 97 A.L.R. 486

The duty of these trustees is to dispose of the company's property, collect all its credits, pay its debts, and distribute the balance among the stockholders.

19 C.J.S., page 1511, note 12
Stuart vs. Chaney
71 Colo. 279
206 Pac. 386
242 Pac. 638
78 Colo. 421

In Bacon vs. Robertson (1855) 18 How. 480, 15 L. Ed. 499, 503, 504, the Supreme Court held that the rights of a stockholder in a dissolved corporation are not inferior to those of creditors, and that a trustee's duties are to maintain their (stockholders) rights to consult their advantage, citing Willison vs. Watkins (1830), 3 Pet. (U.S.) 43, 7 L. Ed. 596, and Willis Trustees, 125, 172, 173.

(D) The dissolved corporation being in the nature of a partnership, having no stockholders or directors and being under a statutory inhibition to do any business except to wind up its affairs, there was no power in the former stockholders and directors to hold meetings authorizing instruments of revival, no power to do the business necessary to a revival, and no right to apply for the same; the issuance of the certificate of revival by the Secretary of State was invalid and without authority of law and there has never been any revival of this corporation.

> "Sec. 1692. Renewal or Revival of Corporate Charter; Procedure to Accomplish.
>
> "Sec. 93. Any corporation heretofore, or now, existing under the laws of this state may at any time procure a renewal or revival of its charter for any period, together with all the rights, franchises, privileges and immunities, and subject to all its existing and pre-existing debts, duties, and liabilities secured or imposed by its original charter and amendments thereto, or existing charter, by filing a certificate with the secretary of state, which certificate shall set forth:
>
> * * *
>
> "5. *That the corporation desiring to renew or revive, and so renewing or reviving, its charter is, or has been, duly organized and carrying on the business authorized by its existing or original charter and amendments thereto,* and desires to renew or continue through revival its

existence under and pursuant to and subject to the provisions of this act."

It will be observed that a jurisdictional requirement to revival is the certificate that the corporation has been "duly carrying on the business authorized by its charter;" and that it was impossible for this corporation to duly carry on the business authorized by its charter after dissolution because of the prohibition provided by law.

Apart from statutes extending the existence of, or conferring powers upon, corporations for the purpose of winding up their affairs, the dissolution of a corporation implies the termination of its existence and its utter extinction and obliteration as an entity or body in favor of which obligations exist or accrue or upon which liabilities may be imposed.

13 Am. Jur., Corporations, Sec. 1342, page 1191

Oklahoma Natural Gas Co. vs. Oklahoma
273 U. S. 257
71 L. Ed. 634
47 S. Ct. 391

First National Bank of Selma vs. Colby
(Attachment dissolved)
21 Wall (U. S.) 609
22 L. Ed. 687

G. M. Standifer Const. Co. vs. Com. of I.R.
(CCA 9)
78 Fed. (2d) 285

In the Oklahoma Gas Co. case, supra, the Supreme Court held that an action against a dissolved corporation abated with dissolution. It is well settled that at common law "a corporation is dissolved as if it did not exist, and the result of the dissolution cannot be distinguished from the death of a natural person in its effect.

"But corporations exist for specific purposes, and only by legislative act, so that if the life of the corporation is to continue even only for litigating purposes it is necessary that there be some statutory authority for the prolongation."

During the extension allowed by statute a corporation

> "has no power to borrow money or continue its ordinary business, except for the purpose of winding up its affairs; and it has no power to form a new company or amend its articles of incorporation."

13 Am. Jur., Corporations, Sec. 1366, p. 1207
Anno. 47 A.L.R. 1548
97 A.L.R. 496

During the period of statutory extension of life of a dissolved corporation it is not authorized to continue the business for which it was established nor to engage in any new business transactions.

16 Fletcher, Penn. Ed., Sec. 8170, page 937
U. S. vs. Bates Valve Bag Corp. 39 Fed (2d) 162
In re Int'l. Sugar Feed Co. 23 F. Supp. 197

At page 200 of this latter case, in discussing the right of a dissolved corporation to file a petition in voluntary bankruptcy and the effect of a continuation statute similar to ours:

> "Moreover an extinct corporation can hardly be revived as provided in Section 56. That provision imports something of continued corporate entity."

During the period of extension a corporation has no power to form a new corporation or amend its articles of incorporation.

13 Am. Jur. Sec. 1366

47 A.L.R. 1548, citing: No power to form new corporation: Mason vs. Pewabic Min. Co. (1885; C.C.) 25 F. 882, affirmed in (1890) 133 U. S. 50, 33 L. Ed. 524, 10 Sup. Ct. Rep. 234, and see Greenwood vs. Union Freight R. Co. (1881), 105 U.S. 13, 26 L. Ed. 961, holding it can originate no new transactions dependent upon its charter.

Where corporation had ceased to exist no corporate powers could be exercised by it except the winding up of its affairs.

James vs. Unknown Trustees (Okla.)
220 Pac. (2d) 831

Rossi vs. Caire
199 Pac. 1042

Holding of a meeting of members after dissolution held to be invalid.

47 A.L.R. 1376

Butler vs. Beach (1909)
82 Conn. 417
74 Atl. 748

Institution of statutory proceedings for extension of corporate existence held to be invalid where taken after dissolution.

Merges vs. Altenbrand (1912)
45 Mont. 355
123 Pac. 21

Rossi vs. Caire
199 Pac. 1042

3. Whatever may have been the legal effect of the effort of this company to revive its corporate existence, the revival statute cannot give validity to invalid acts done during dissolution nor can it deprive these plaintiffs of rights acquired from Corbari, a tenant in common with the other stockholders during the period of dissolution.

Beeler & Campbell Supply Co. vs. Warren
151 Kan. 755
100 Pac. (2d) 700

4. Curative statutes are necessarily retrospective in character and may be enacted by legislature to validate any proceeding which it might have author-

ized in advance or have dispensed with altogether, provided such legislation does not impair vested rights but only confirms rights already existing.

Beeler & Campbell Supply Co. vs. Warren
151 Kan. 755
100 Pac. (2d) 700

16 CJS, Constitutional Law, Sec. 422, page 875.
11 Am. Jur., pages 1208-9

5. The purchase of the pledged stock by defendant Wahyou at foreclosure and sale did not operate to deprive plaintiffs of their interest in the corporate assets acquired by virtue of the assignment from Corbari.

(A) The transferrable character of stock is destroyed by dissolution. Wahyou, at most, acquired only an equitable interest in Corbari's share of the assets of the Diamond-S Ranch Co. Note the fact that the pledge was made during dissolution.

Hollingsworth vs. Ditch Co. (CCA10, 1931)
51 Fed. (2d) 649

In this case the plaintiff had purchased at a sheriff's sale certain certificates of stock in the defendant corporation. Prior to her purchase, the corporation had been dissolved. Plaintiff asked to be adjudged the owner of the shares purchased at the sheriff's sale and prayed further that the trustees of the corporation be ordered to convey to her her proportionate interest in the assets of the corporation. Holding that the plaintiff did not become a stock-

holder of the Ditch Company by virtue of purchasing the shares of stock at the sheriff's sale, the court quoted Morowitz on Private Corporations (2d. ed.), Sec. 168, as stating the applicable rule as follows:

> "The right of a stockholder to transfer his shares necessarily ceases upon a dissolution of the corporation; for after a dissolution, the contract of membership is at an end, and no further novation is possible. The interest of the shareholder in the assets of a corporation after its dissolution is a purely equitable claim, and an assignment of this interest will be recognized only by a court having jurisdiction in equity."

16 Fletcher Cyclopedia Corporations, 861, Sec. 8130:

"Dissolution terminates the personal, but not the property, rights of stockholders * * *. The relation of stockholders in an expired corporation are analogous to the relations of partners."

16 Fletcher Cyclopedia Corporations, 872, Sec. 8131:

"The transferrable character of corporate stock is destroyed by dissolution, and an attempted transfer or assignment of shares of stock after the corporation has been dissolved passes no legal title and does not make the purchaser or assignee a stockholder."

(B) When the defendant Wahyou purchased Corbari's stock at the foreclosure sale he did so at a

time when the corporation was dissolved and when he occupied the position of a trustee and was in a fiduciary relationship with the former stockholders, including Corbari and his assignees. In purchasing the stock and purporting to thus extinguish the interest of plaintiffs in and to Corbari's share of the assets of the corporation the defendant Wahyou violated his fiduciary duty to these plaintiffs.

Cal. App, 1952, Directors of a corporation bear a fiduciary relationship to the stockholders and must administer their duties for the common benefit.

Remillard Brick Co. vs. Remillard Dandini Co.
241 Pac. (2d) 66
109 CA(2) 405

Cal. App. 1952. A director of a corporation while acting in a fiduciary capacity would not unite his personal and representative character in the same transaction and use his official position to benefit himself individually.

Bernard vs. Shure
245 Pac. (2d) 370
111 CA(2) 920

Cal. App. 1952. Under the civil code there is a rebuttable presumption of undue influence and insufficient consideration where a trustee deals with his beneficiary. The code includes the relationship of attorney and client.

Civil Code, Sec. 2235

McDonald vs. Hewlett
228 P. (2d) 83
102 CA (2d) 680

Where attorney purchased stock which was affected with a trust in client's favor he has the burden of showing that the purchase was fair and honest and client can secure return without proof of actual fraud.

Martin vs. Dixon
49 Nev. 161
241 Pac. 213

Guardian cannot be permitted to reap any personal benefit from the estate of his ward other than compensation for his services.

Anderson vs. Anderson
54 Nev. 108
7 Pac. (2d) 814

An attorney is disqualified for acting for another interested adversely to his client.

Gottwals vs. Rencher
60 Nev. 35
92 Pac. (2d) 1000
98 Pac. (2d) 481

(Cal. 1898) Under Civil Code, Sec. 2230, Subd. 1, prohibiting trustees and their agents from taking part in any transaction concerning the trust, adversely to the interest of the beneficiary, sale by assignee of an insolvent debtor to his own attorney was void

as to creditors and created a constructive trust in their favor.

Broder vs. Conklin
53 Pac. 699
121 Cal. 282

(Cal. 1926) One in a fiduciary relation may not act in both individual and representative capacity.

In re: Parker's Estate
251 Pac. 907
200 Cal. 132
49 A.L.R. 1025

Under a Missouri statute similar to ours it was held that the trustees of a dissolved corporation are liable to a suit by the stockholders to account, and court of equity had jurisdiction to remove them from office for malfeasance in office, or any betrayal of their trust.

47 A.L.R. 1465

In Lauger vs. Fargo Mercantile Co. (1921), 48 N.D. 545, 186 N. W. 104, the directors of an expired corporation who had formed a new one without notifying the plaintiff stockholder were held to be trustees for the stockholders of the dissolved corporation.

It is a broad rule followed in many jurisdictions that any purchase by a trustee for his own benefit of an outstanding title, claim to, or interest in, the trust property, whether at a judicial execution, foreclosure, private or other sale by, or brought about

by, another, is presumed to be for, and inures to the benefit of, the trust estate and the beneficiaries, at their election, irrespective of actual good faith or fraud on the part of the trustee.

54 Am. Jur., Trusts, Sec. 458, page 364

Union P. R. Co. vs. Durant
95 U. S. 576
24 L. Ed. 391

Walden vs. Bodley
14 Pet. (U.S.) 156
10 L. Ed. 398

Willison vs. Watkins
3 Pet. (U.S.) 43
7 L. Ed. 596

Anno:
77 A.L.R. 1515, Sale Brought about by Another
128 A.L.R. 918

To the same effect, see 65 C. J., Trusts, Sec. 521, P. 656, note.

Farmers Loan Co. vs. San Diego Co.
(CCSD Cal. 1891)
45 F. 518,
527 and 528.

North Confidence Mining Co. vs. Fitch
58 Cal. App. 329
208 Pac. 328

Palo Alto Assn. vs. First National Bank
33 Cal. App. 214
164 Pac. 1123

Highland Park Inv. Co. vs. List (1915)
27 Cal. App. 761
151 Pac. 162

Dean vs. Shingle (1926)
198 Cal. 652
246 Pac. 1049

Sims vs. Petaluma Gas & Light Co. (1901)
131 Cal. 656
63 Pac. 1011

Graves vs. Mono Lake Hydraulic Mining Co. (1889)
81 Cal. 303
22 Pac. 665, 670

(C). The laws of the State of California place a very high duty upon a trustee in his dealings with the corpus of a trust.

"Sec. 2224. One who gains a thing by * * * the violation of a trust is, unless he has some other and better right thereto, an involuntary trustee of the thing gained for the benefit of the person who would otherwise have had it."

"Sec. 2228. Trustee's obligation to good faith. In all matters connected with his trust, a trustee is bound to act in the highest good faith toward his beneficiary, and may not obtain any advan-

tage therein over the latter by the slightest misrepresentation, concealment, threat, or adverse pressure of any kind."

"Sec. 2229. Trustees not to use property for his own profit. A trustee may not use or deal with the trust property for his own profit or for any other purpose unconnected with the trust, in any manner."

"Sec. 2230. Certain transactions forbidden. Neither a trustee nor any of his agents may take part in any transaction concerning the trust in which he or anyone for whom he acts as agent has an interest, present or contingent, adverse to that of his beneficiary, except as follows:

"1. When the beneficiary, having capacity to contract, with a full knowledge of the motives of the trustee, and of all other facts concerning the transaction which might affect his own decision and without the use of influence on the part of the trustee permits him to do so;"

"Sec. 2231. Trustee's influence not to be used for his advantage. A trustee may not use the influence which his position gives to him to obtain any advantage from his beneficiary."

"Sec. 2232. "Trustee not to assume a trust adverse to interest of beneficiary. No trustee, so long as he remains in the trust, may undertake another trust adverse in its nature to the interest

of his beneficiary in the subject of the trust, without the consent of the latter."

"Sec. 2233. To disclose adverse interest. If a trustee acquires any interest, or becomes charged with any duty, adverse to the interests of his beneficiary in the subject of the trust, he must immediately inform the latter thereof, and may be at once removed."

"Sec. 2234. "Trustee guilty of fraud, when. Every violation of the provisions of the preceding sections of this article is a fraud against the beneficiary of a trust."

"Sec. 2235. Presumption against Trustee. All transactions between a trustee and his beneficiary denying the existence of the trust, or while the influence acquired by the trustee remains, by which he obtains any advantage from his beneficiary, are presumed to be interested into by the latter without sufficient consideration, and under undue influence."

"Sec. 2237. Measure of liability for breach of trust. A trustee who uses or disposes of the trust property contrary to section two thousand two hundred and twenty-nine, may, at the option of the beneficiary, be required to account for all profits so made, or to pay the value of its use, and, if he has disposed thereof, to replace it, with its fruits, or to account for the proceeds with interest."

V
CONCLUSION

While the chronology of events in this case is somewhat complex, the position of plaintiffs and the theory upon which they assert their right to recover the relief prayed is very simple. Plaintiffs believe, first, that the purported renewal or revival of the Diamond-S Ranch Company, as a corporation, did not vitiate the assignment given to plaintiffs by Corbari during dissolution, and second, the sale and purchase on foreclosure of the shares of stock of Corbari by defendant Sam Wahyou does not operate to exclude plaintiffs from participating in Corbari's share of the assets of the Diamond-S Ranch Company for the reason that the defendant, Sam Wahyou, at the time he purchased the stock on foreclosure was a trustee of the assets of the corporation by reason of being a director of the dissolved company and was therefore in a fiduciary relationship with Corbari and with Corbari's assignees, plaintiffs in this case. Whether Wahyou knew of the assignment at the time he purchased the stock or later learned of it, he is now and at all times has been in a fiduciary position as a trustee and along with the other trustees of defendant corporation is liable to account to these plaintiffs for their equitable share of the assets of the company. Moreover, Wahyou purchased the Corbari stock under color of foreclosing a pledge which had been made after dissolution. There is grave doubt if he acquired anything by the transaction.

The pattern of conduct employed by defendants in

this case and carried out under the careful guidance of their mutual attorney, Forrest Macomber, was obviously designed and contrived for the specific purpose of depriving the Smeed Estate of its rightful share in the assets of the company. A somewhat parallel course of conduct came to the attention of Justice Cardoza when he delivered the opinion of the United States Supreme Court in Buffum vs. Peter Barceloux Co., 77 L. Ed. 1140, 289 U. S. 227. There, in April, 1926, Henry Barceloux owned 2500 shares of the Peter Barceloux Co., having a book value of over $90,000.00 and an actual value of over $94,000.00, but not traded in and having no current market value. One Freeman had a judgment against Henry Barceloux for $50,000.00 and wanted his money. On April 27, 1926, Henry Barceloux pledged 2499 shares of his stock to the corporation to secure a pre-existing indebtedness in the amount of about $33,000.00. In June, 1926, Freeman became insistent for his money or for security and was given an assignment of Henry Barceloux's equity in the shares of stock previously pledged to the corporation. A few days later the corporation cancelled Henry Barceloux's certificates for 2499 shares and took out a new certificate in a new name as pledgee. On August 26, 1926, there was, in the words of Justice Cardoza, "a gesture of a public sale. A printed notice had been posted on a telegraph pole and perhaps elsewhere. There was no other notice to Freeman or to anyone else." The corporation bid the stock in at the sale for the amount of its claim against Henry Barceloux, plus a fee for its attorney.

Henry Barceloux then disposed of all of his remaining property and became bankrupt. The trustee in bankruptcy then brought suit to recover from the Peter Barceloux Co. the value of the property pledged by Henry Barceloux on the theory that the pledge was made with fraudulent intent. Justice Cardoza held the transfer arising out of the pledge, public sale, and purchase by the corporation, to have been a transfer in fraud of creditors, and said:

> "The pledge was a step in a general plan which must be viewed as a whole with all its composite implications (citing cases). The principal assets of the debtor were his certificates of stock in the family corporation. There was to be a delivery of these certificates as security for an indebtedness much less than the value of the collateral deposited. There was to be a delivery of other security to make sure that all the assets of the debtor, not otherwise encumbered, would be within the control of the pledgee. There was to be a sale so secret that none of the creditors would be likely to know anything about it, with the result that other bids would be forestalled, and embarrassing inquiries as to preferences averted * * *. The unconscionable sale is not to be viewed in isolation, as something disconnected from the pledge, an accident or afterthought. It was the fruit for which the seed was planted, or so the trier of the facts might look at it."

See also:

54 Am. Jur., Trusts, Sec. 453
Anno. 1 A.L.R. 747
Anno. 132 A.L.R. 265

In North Confidence Mining, etc. Co. vs. Fitch, et al, 58 Cal. App. 329, 208 Pac. 328, a stockholder brought action to cancel a note and mortgage given by a corporation to defendant Fitch, assignee of defendant Chute. The note and mortgage was to pay a claim, also assigned to Fitch, by Chute, for amounts advanced by Chute as officer of the corporation. The note and mortgage had been authorized by the corporation at a meeting of directors at which five of seven directors were present. Chute himself was one of the five and the attorney for Fitch was another. Four constituted a quorum. Lower court found note to be partly valid. Both plaintiff and defendants appealed. Appellate court reversed, holding note and mortgage was totally invalid, holding that Chute and Webster were both disqualified by the provisions of Section 2230 of the California Code; and that directors of a corporation are trustees within the meaning of that section. Citing, besides cases listed supra:

San Diego vs. Pacific Beach Co.
112 Cal. 53
44 Pac. 333
33 L.R.A. 788

Schnittger vs. Old Home Consol. Mining Co.
144 Cal. 603
78 Pac. 9

Smith vs. Pac. Vinegar & Pickle Works
145 Cal. 352
78 Pac. 550
104 Am. St. Rep. 42

In the case at bar Forrest Macomber was attorney for the corporation, for the defendant Wahyou, and for Corbari. He was also the attorney who took care of the details of the sale of the pledged stock to Wayhou. At the time of the sale to Wahyou he knew of the assignment to Smeed by Corbari, and that the corporation was in dissolution; he knew that the debt to Smeed had not been paid, because he offered at that time to settle the debt for $5000.00 (99, 100). He also knew that Wahyou was a trustee of the assets of the dissolved corporation and was dealing in a way that could be detrimental to the assignee of a part of the assets of the dissolved corporation. Certainly, if Wahyou had nothing more than constructive notice of the assignment, the knowledge that Macomber had as his attorney and as attorney for the corporation and for Corbari was imputed to Wahyou. It is the position of the plaintiff that the very fact of all of these items being a matter of actual knowledge on the part of the attorney, and all of the details in connection with the foreclosure and sale having been handled by the same attorney, there can be nothing less than an intention on the part of all of

the parties involved to defeat the Smeed interests which had been created by a similar assignment.

Surely no court can say that a holder of an undivided interest in the assets of a dissolved corporation cannot assign or deal with those assets, and once having so dealt is thereby bound. If the assignment was valid at the time it was made and recorded the property interest thereby created in the plaintiffs cannot be erased or voided by the attempted revival of the corporation. The appellants feel that the court should reverse the trial court and grant judgment to the appellants as prayed for in their amended complaint.

Respectfully submitted,

PIKE & McLAUGHLIN
Residing at 15 E. First Street
Reno, Nevada

SMITH & EWING
Residing at Caldwell, Idaho

CARVER, McCLENAHAN & GREENFIELD
Residing at Boise, Idaho

By Laurence M. Smith
Attorneys for Appellants.